Morton International, Inc. *and* Martin D. Howell. Case 9–CA–30898

November 10, 1994

DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On July 20, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Morton International, Inc., West Alexandria, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Joseph C. Devine, Esq., for the General Counsel.
David J. Millstone and *William A. Nolan, Esqs.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Dayton, Ohio, on May 17, 1994, pursuant to charges filed on July 15, 1993, and amended on August 24 and October 22, 1993,[1] and complaint issued October 25 alleging Martin D. Howell and Robert Boerner were unlawfully suspended and discharged for engaging in protected concerted activity. Morton International, Inc. (the Respondent) contends the suspensions and discharges were for cause and did not violate Section 8(a)(1) of the National Labor Relations Act (the Act) as alleged.

Upon the entire record, and after considering the demeanor of the witnesses and the posttrial briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. THE RESPONDENT'S BUSINESS

The Respondent is a corporation engaged in the manufacture and nonretail sale of adhesives at West Alexandria, Ohio, and during the 12 months preceding the issuance of the complaint, sold and shipped its products valued in excess of $50,000 from its West Alexandria facility to points located outside the State of Ohio. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. SUPERVISORS AND AGENT

At all times material to this proceeding, the individuals named below held the positions set forth opposite their names and have been supervisors and agents of the Respondent within the meaning of Section 2(11) and (13) of the Act.

Randall Bittner—Plant Manager
Jane Paxton—Manager for Human Resources
Leigh Walling—Polyester Supervisor
Bob Napier—Maintenance Supervisor

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Chronology*

The facts are not in dispute with respect to the conduct of Boerner and Howell which led to their discharge, and all these facts were known to the Respondent at the time the two were discharged.

On the morning of June 14, at about 2 or 2:30 a.m., Boerner was lunching with a custodian named Snider ''Butch'' Neusock, and another employee. All were smokers. Snider had placed a memo on the table.[2] The memo was addressed to the Respondent's safety committee and signed, ''Morton employee.'' The memo, in substance complained that the Respondent was not rigidly enforcing its no-smoking policy. The last sentence in the lengthy memo reading, ''Also, what about the employees who do not use tobacco products—when will we be able to have a 'non-smoke' break of ten minutes or more every hour?'' was composed by Brenda Holfinger, an assistant to the health and safety administrator. Holfinger is a regular hourly paid employee.

Indignant at the content of this memo, Boerner wrote comments on it in bold letters reading in one instance, ''Chicken Shit'' after the anonymous ''Morton employee'' appearing as the originator of the memo, and at another point made the observation, without an aquerbian mark ''could this be racist'' in reference to a sentence reading, ''I hate to see them [the Respondent] back down because of pressure from a minority of the employee [i.e., smokers]'' warning to his task, Boerner enlarged his commentary by noting at the bottom of the purloined memo. Again in very large letters, ''I think the non-smokers should quit their damm [sic] crying and put their thoughts to a more useful purpose for the company!'' In the course of his composition of this broadside, Boerner sought assistance in the spelling of a word from Neusock

[1] All dates are 1993 unless otherwise stated.

[2] The custodian was later discharged on the ground he had removed the document from company records in a locked office.

who obliged. What word he assisted with is not specified, but I seriously doubt it was, ''Damm.''

Apart from the minuscule assistance included by Neusock, who made no other contribution to Boerner's effort, none of the three men lunching with Boerner, whom he states shared his views, were in any way party to the writing on or posting of the memo by Boerner, nor is there any evidence they designated him as their representative for any purpose. Boerner left the area after posting the memo with his comments on it.

Enter Howell. At about 4 a.m. he entered the empty lunchroom. Noticing the posted memo with Boerner's amendations, he took it to a table and read it. A smoker himself, Howell was then inspired to add further commentary on the memo. At the very top of the memo he wrote, ''Gee, Brenda this isn't you is it? Get a real job you glorified secretary.'' In response to a statement in the memo referring to ''the old days'' he penned, ''What do you know about the ''old days.'' Directing his attention to the memo claim the company was retreating from a policy, he noted, ''what policy? be specific Brenda.'' Concerning a statement in the memo to the effect that forcing smokers to do so outside in all weather would deter smoking, Howell wrote, ''then more of us would miss work for being sick.'' To this point none of the memo was composed by Brenda Holfinger who typed the memo. Now, however, her sentence quoted above closed the memo and moved Howell to expound, ''has production suffered, no, so shut up and stay the hell out of the trailer.''[3] Finally, at the bottom of the page, Howell commented on Boerner's adjuration to nonsmokers that they should put their thoughts to a more useful purpose, stating this would be quite difficult for this nonsmoker cause *she* has no ''useful thoughts!'' Finished with his commentary, Howell made copies and posted them in the breakroom, the smoke trailer, and on a bulletin board by the health and safety office.

Discovering the altered and posted memo, Respondent launched an investigation. As a result the custodian who admitted taking the document from company files as a joke was fired. Boerner and Howell each candidly advised the Respondent of their conduct with reference to the memo. They were suspended pending the results of the Respondent's investigation. Each received a letter from Jane Paxton dated June 15 and reading as follows:

> Subject: Suspension Notification Without Pay
>
> As we discussed, the Company is investigating concerns that you may have violated our policies. In particular, we are reviewing policies including but not limited to:
>
> a. Harassment or intimidating language or conduct, . . .
> b. Conduct that reflects unfavorably upon the Corporation.
> c. Making malicious, false or derogatory statements that may damage the integrity or reputation of the Corporation, its products and performance, or its employees.
> d. Destruction, damage, improper disposition, or unauthorized possession or removal from Company premises of property that does not belong to the employee.
> e. Posting, distributing, or circulating any written materials in work areas deemed inappropriate or disruptive.
>
> Pending the outcome of this investigation, you have been suspended. I will be the person investigating these concerns.
>
> What you can expect was discussed as the investigation is conducted. I will review the information and documentation you provided. As appropriate, I will consult with other employees and managers to assist in addressing and resolving the issues, and I will strive to keep you informed of the progress of this investigation.
>
> I want to emphasize some of our expectations of you during this investigation. If you have any questions or concerns about any of these expectations, or about any part of this investigation, please contact me immediately. The expectations for you include the following:
>
> You are expected to cooperate fully throughout the investigation, and be completely honest in answering questions and providing information to the Company.
>
> You are expected to provide us with all of the information and documentation that you believe may help us in conducting this investigation. If you have any information or documentation that may be relevant to this matter and which you have not already provided, please provide immediately.
>
> While this investigation is being conducted, you will be suspended without pay. During this time you must devote your full efforts to help bring this matter to closure. You must remain available during normal working hours to meet and/or provide information to Company representatives.
>
> This is a confidential investigation. You must not discuss this investigation with any person who does not have a legitimate business need to know this information. If you have any questions or concerns about this requirement at any time, please feel free to discuss it further with me.
>
> If you have any questions or concerns about any of these expectations, or about any part of this investigation, you will contact me immediately. I will contact you within the next three days to let you know of the progress of the investigation.
>
> Please let me know if you have any questions, additional information, or want to discuss any of this. As you know, you can reach me at 839–4612.

Completing its investigation, the Respondent gave Boerner and Howell identical dismissal letters dated June 18 and reading as follows:

> Subject: Investigation—Termination
>
> We have completed the investigation of the alleged violation of policy listed in your suspension letter of June 15, 1993.
>
> Our conclusions, based on interview with employees and your statement are:

[3] Respondent has a trailer to which employees may repair to smoke on their breaks.

> While working third shift on Sunday night, June 13th, an employee removed a confidential memo from the locked office of Health & Safety, made a copy and gave it to the Polyester third shift employees. You and one other Polyester employee co-authored derogatory, inflammatory and false comments on the memo, made additional copies and distributed it.
>
> WAL cannot tolerate such actions and multiple violations of company policy. Therefore, your termination is effective immediately due to misconduct. Your final paycheck will include 32 hours of vacation payoff.

B. *Discussion and Conclusions*

The facts are clear and undisputed, but do they show the discharges were unlawful or legitimate? As I have previously stated in *Gatliff Coal*,[4] the answer to such questions depend on whether concerted action is present, whether that action is protected if it is in fact concerted, whether the General Counsel has set forth a prima facie case, the terminations were precipitated by protected concerted activity, and, if General Counsel has such a prima facie case, would Respondent have taken the same action in the absence of the protected activity? The first step in the process of determining these issues is measuring the facts found against the guide set forth in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I)*, in the following terms:

> In general, to find an employee's activity to be ''concerted,'' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the he employee's protected concerted activity. [Footnotes deleted.]

and as recited in *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*):

> We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints tot he attention of management.

General Counsel, relying on *Meyers I*; *Amelio's*, 301 NLRB 182 fn. 4 (1991); and *Dayton Typographical Service*, 273 NLRB 1205 (1984), contends Boerner's conduct was concerted because other employees were opposed to the suggestions in the memo, Neusock assisted Boerner in the drafting of his comments on the memo, and Boerner's posting of the memo was a solicitation of employee actions and a logical outgrowth of the employees' joint complaint about the memo's stance on smoking.

I do not believe Boerner's conduct was concerted merely because others were opposed to the memo's suggestions inasmuch as there is no persuasive evidence the other three memo readers, or any one else, authorized him to act on their behalf, or, with respect to the reference to the footnote in *Amelio's*, that Boerner's writings on the memo were necessarily a logical outgrowth of the concerns expressed by the group at the lunchroom table. Moreover, I do not agree that mere assistance in the spelling of a word threw Neusock into concert with Boerner. I do, however, conclude in accord with *Meyers II*, supra, that Boerner was engaged in concerted activity because his uncontroverted and credible testimony that he posted the memo, with his comments thereon. ''To let the other people in the plant know—the other smokers know that this had been written and to see if—maybe if they had any comments or any hard feelings, maybe they would express their feelings'' warrants a fair conclusion that he was seeking ''to initiate or to induce or to prepare for group action'' by fellow smokers in opposition to the sentiments expressed in the memo which were contrary to the interest of employees who smoked and in support of his writings on the memo.[5]

When Howell added his words to the memo, he endorsed and joined Boerner's effort in protest of the memo's attack on the existing smoking policy. That he did not then know Howell was the one who added the commentary to the memo is of no consequence. Here two employees reacted adversely to the memo and took complementary action to oppose it because they were smokers concerned in a common goal of preserving the status quo as it related to the policy on smoking. Howell's conduct in copying the notice, with his comments added thereon and posting it in several additional areas was an enlistment in and enlargement of Boerner's effort to inform other smokers of the threat the memo posed to existing smoking policy which was acceptable to employees who smoked.

The Respondent's smoking policy is a term or condition of employment, *Allied Signal*, 307 NLRB 752, 754 (1992), and the concerted activity of Boerner and Howell directed at protesting any change in policy thus concerns a term or condition of employment and is protected. The dismissal letters given to Howell and Boerner flatly stated the reason for their discharge to be ''You and one other Polyester employee co-authored derogatory, inflammatory and false comments on the memo, made additional copies and distributed it.'' This evidences that the Respondent believed they were acting concertedly in writing on and posting the altered memo, and terminated them for engaging in such activity. It is well settled that discharges based on suspected concerted activities violate Section 8(a)(1) of the Act even if the suspected concert did not exist. See, e.g., *American Poly Therm Co.*, 298 NLRB 1057, 1065 (1990); *Gulf-Wandes Corp.*, 233 NLRB 772, 778 (1977).

I conclude the evidence warrants an inference the known or suspected participation of Boerner and Howell in protected concerted activities was a motivating factor in the Respondent's decision to discharge them. The burden rests on the Respondent to show the discharges would have taken place in the absence of protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] *Gatliff Coal Co.*, 301 NLRB 793 (1991).

[5] The testimony of Jane Paxton that her investigation received a report that the comments at issue were designed to start up trouble evidences that the Respondent recognized the comments were of interest to other employees and would tend to inspire debate.

The Respondent asserts Boerner and Howell were terminated for misconduct because each had violated company policies prohibiting conduct described in the Respondent's handbook as follows:

> 1. Harassment or intimidating language or conduct.
> 2. Destruction, damage, improper disposition, or unauthorized possession or removal from Company premises of property that does not belong to the employee.
> 3. Posting, distributing, or circulating, any written materials in work areas deemed inappropriate or disruptive.
> 4. Making malicious, false or derogatory statements that may damage the integrity or reputation of the corporation, its products and performance, or its employees.

Items 1 and 4

Respondent argues that the comments added to the memo by Boerner and Howell were merely personal attacks against the memo's author and therefore are not protected. It is the content of the memo, not the identity of the author, which caused Boerner and Howell to react to what they perceived to be a threat to the existing policy and practice concerning smoking. Howell credibly states his comments were directed at the memo and its author. Boerner credibly states he wrote what he did because he was upset at the content of the memo. Respondent's contention that the conduct of the two men was solely personal anger unrelated to terms and conditions of employment and therefore not protected concerted activity is simply without merit. The two were angry it is true, but that anger was raised by what they reasonably perceived as an effort to change the smoking policy, a term or condition of employment, in a manner detrimental to the interest of those employees who smoked. They were angry at the content of the memo. That this anger was also directed at its author is not surprising. I do not believe employees protesting a change in a condition of employment are required to surgically express their protest in a prescribed manner leaving out any spirited or even profane aspersions directed at the memo or its author. Here the Respondent is exercised at the language used by Boerner, i.e., the term ''chicken shit,'' and Howell's direction of his attack at Brenda Holfinger whom he thought was the author but was merely a coauthor. The Respondent characterized the language of Boerner as profanity and that of Howell as ''malicious defamatory . . . obnoxious, and wholly unjustified'' and therefore not protected. With respect to the references to the memo author as ''chicken shit,'' I do not believe the Respondent is as terribly upset about the use of this term as it claims to be, given the uncontroverted and credible testimony of Boerner that ''shit'' is a common expression in Respondent's facility. Be that as it may, I have found Boerner was engaged in protected concerted activity directed at rousing smokers to unite in opposition to changes to existing policy. The Board, with court approval, has found that an employee who characterized an acting supervisor in writing as an ''a–hole,'' an obvious contraction of ''asshole,'' was engaged in protected activity when he resorted to this sort of rhetorical hyperbole to emphasize disapproval of the acting supervisors, and the use of the term did not make his conduct unprotected *Postal Service*, 241 NLRB 389 (1979), enfd. 615 F.2d 1366 (8th Cir. 1979), citing *Linn v. Plant Guards Local 114*, 383 U.S. 53, 63 (1966), and *Letter Carriers Local 469 v. Austin*, 418 U.S. 264, 283 (1974). The use of ''chicken shit'' as a descriptive term of disapproval does not strike me as more offensive than ''a–hole.'' In so concluding I am well aware that such matters of degree of offensiveness can be argued ad infinitum by determined opponents without any agreement ever reached. Suffice it to say that in my view the distinction is not worth the argument.

With respect to Howell's comments directed to Holfinger, I doubt very much that their publication had or will have ''an inevitable negative effect on [her] status in the eyes of the employees'' as Respondent contends, or may damage the integrity or reputation of the Respondent, its product and performance, or its employees. Holfinger is allied with the employees who oppose the smoking policy, presumably the nonsmokers. Howell and Boerner belong to the smoking group. There is no showing Holfinger ever had a favorable status in the eyes of employees who smoke, and the fact she was vilified by a smoker is not likely to lower her status in the eyes of the nonsmokers. Respondent has not shown there has ever been any disciplinary action against any employee other than Boerner and Howell for ''harassment or intimidating language or conduct.'' I do not believe it likely that no other employee ever violated the rule against such conduct, or that no other employee was ever known by supervision or management to have done so. The absence of any proffer by Respondent of evidence this rule has ever before been applied or been cause of discipline or discharge leads me to believe it has not been so applied until the situation before me arose, and, further, that Respondent probably does not regularly police such conduct. It is somewhat ingenuous to claim that Holfinger was falsely accused inasmuch as she did type the memo and took the opportunity to add her own opinion which is clearly not a measured and unbiased view.

Item 2 and 3

There is no evidence whatsoever that Boerner or Howell was aware they were dealing with a purloined document, the memo does not on its face show its possession by employees was unauthorized or in any way contrary to Respondent's policy, nor is there any evidence they should have known that was the case. I therefore conclude item 2 is an excuse for the discharges rather than a tenable reason. The conclusions of item 2 are unsupported by probative evidence and their proffer is, I find, part of a shotgun approach to see what might hit the targets, Boerner and Howell.

Turning to Respondent's posttrial brief contention that both men violated the policy against posting disruptive materials, I first note that the policy which appears in the employee handbook exactly as set down above as item 3 makes specific reference to posting, distributing, or circulating written matters in work areas. Boerner only posted the memo in the employee breakroom, which is patently not a work area. The rule therefore cannot apply to hidden conduct. Howell credibly testified he posted copies by the timeclock, in the breakroom, in the smoking trailer, and on the bulletin board by the health and safety office. Respondent proffers no persuasive evidence that any of these postings were in a work area, and Howell's description of the posting areas would seem to indicate they were not work areas. Respondent has

therefore not shown the rule was violated,[6] and I find it was not because no postings were made in work areas. The use of the rule by Respondent as a defense therefore can not prevail. Here again, I conclude Respondent has consciously manufactured a reason that does not exist in order to disguise its true motivation.

The evidence shows Howell and Boerner were engaged in protected concerted activity when they placed their comments on and posted the memo, those activities were a motivating factor in Respondent's decision to discharge them, and General Counsel has made out a prima facie case the Act has been violated. The burden on the Respondent to prove the discharges would have taken place in the absence of any protected activity has not been met. Accordingly, I find General Counsel has proved by a preponderance of the credible evidence that Howell and Boerner were discharged in violation of Section 8(a)(1) of the Act.

To the extent the complaint alleges their suspension during investigation violated the Act, I do not so find. It was not unreasonable for the Respondent to suspend the employees involved in the handling of a document wrongfully extracted from its files while it conducted an appropriate investigation. It is its conduct after it ascertained the facts which runs afoul of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by discharging Martin Howell and Robert Boerner on June 18, 1993, because they engaged in protected concerted activity.

3. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual notice posting and cease-and-desist requirements, my recommended Order will require Respondent to offer Howell and Boerner immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority, or other rights and privileges previously enjoyed, and make them whole for any loss of earnings suffered as a result of the discrimination against them. Backpay shall be calculated and interest thereon computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall further recommend that Respondent be required to remove from its files any reference to their discharges and notify them in writing that this has been done and that the discharges will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Morton International, Inc., West Alexandria, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Martin D. Howell and Robert Boerner immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the discharges of Howell and Boerner on June 18, 1993, and notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in West Alexandria, Ohio, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

[6] Whether the posting rule is valid or not is not before me.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employees because they engage in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Martin D. Howell and Robert Boerner immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Howell and Boerner on June 18, 1993, and notify them in writing that this has been done and that the discharge will not be used against them in any way.

MORTON INTERNATIONAL, INC.